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Section 8(a)(1)	3, 6, 7, 8
Section 8(a)(3)	6, 7, 8

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 520

CONE BROTHERS CONTRACTING COMPANY; TAMPA SAND & MATERIAL COMPANY; FLORIDA PRESTRESSED CONCRETE CO., INC., PETITIONERS,

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 13-23) is reported at 317 F. 2d 3. The Board's decision and order (Pet. 24-25; R. 452-465)[1] are reported at 135 NLRB 108.

[1] References designed "R." are to the pleadings, decision and order of the Board, printed pursuant to the rules of the court of appeals as Volume I, Transcript of Record. References to the portions of testimony and exhibits printed as a joint appendix in the court of appeals are designated "A."

JURISDICTION

The decision of the court of appeals issued on May 8, 1963, and a petition for rehearing was denied on June 29, 1963 (Pet. 13, 28, 2). A decree was entered on July 10, 1963, and an amended decree on July 31, 1963 (Pet. 26-27). The petition for a writ of certiorari was filed on October 7, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an employer commits an unfair labor practice if, acting with an intent to defeat a union's organizing campaign, he assigns union members to jobs which require them to cross picket lines and then discharges them for their refusal to cross such picket lines.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. Sec. 151, *et seq.*) are set forth at pages 2-3 of the petition.

STATEMENT

A. The Board's findings of fact

Petitioners are three corporations which, by virtue of their common ownership, control and management, constitute a single employer within the meaning of the Act (R. 302-304). Tampa Sand and Prestressed both manufacture and sell stone and concrete products; Cone Brothers is engaged in road

and bridge construction (R. 296-297). In February 1960, Local 925, International Union of Operating Engineers, AFL-CIO, commenced an organizational campaign among the employees of Cone Brothers and Prestressed. In the same month Teamsters, Chauffeurs, Helpers Local Union No. 79 started a campaign among the employees of Tampa Sand (R. 293). During these organizational drives, petitioners engaged in coercive interrogation, physical intimidation and threats of discharge, thereby seeking to discourage the employees' union activity (R. 322, 333, 340, 349-350, 389-390).[2] The sole issue here concerns the discharge of three employees of Tampa Sand who refused to cross a picket line of striking employees at Prestressed. The relevant facts are as follows:

On May 24, 1960, as part of its organizing drive, the Operating Engineers Union called a strike and established picket lines at the premises of Cone Brothers and Prestressed (R. 293). Tampa Sand was not then picketed (R. 293; A. 71-72). On the afternoon of May 25, the general manager of Tampa Sand, Charles Poe, received a request from Prestressed's superintendent for two drivers and mixer-trucks to work at the Prestressed yard the next day (R. 350; A. 124). It was normal procedure for Tampa Sand's trucks and drivers to be assigned occasionally to work for Prestressed (R. 352; A. 124).

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[2] The Board found that petitioners committed numerous violations of Section 8(a)(1), and these findings were not disputed in the court of appeals (R. 3-5; Pet. 14-15).

The dispatchers at Tampa Sand's principal office ordinarily scheduled the work assignments and selected the employees and trucks which were sent to particular job sites (R. 352; A. 14-15, 53). On this occasion, Poe assumed this function himself and designated the drivers to be sent to Prestressed (R. 353-356; A. 18-19, 24-25, 67-68, 125-130). For some time prior to May 26, Poe had been canvassing union sentiment among the employees (R. 342-343), in anticipation of a representation election which was to be held among the Tampa Sand employees on June 7 (R. 293 n. 3). On May 25 he directed the dispatchers at the central office to send to Prestressed a driver named Stringfellow, who was known to him as a union supporter (R. 363; A. 139). When Stringfellow informed the dispatchers the next morning that he would not work at Prestressed because of the picket line on the premises, they arranged (without notifying Poe) to send another driver—who did not object to crossing the picket line—in his stead (R. 353; A. 23, 44-45).

On the morning of May 26, another union adherent, named Mathis, was also sent to Prestressed's premises from a second Tampa Sand "bin" after he had informed the dispatcher that he would not cross the picket line (R. 353; A. 59-60). At about 8:00 a.m. on May 26, Mathis called the dispatcher and notified him that the picket line was on the premises and that he would not cross it (R. 353-354; A. 59-60). He was told by the dispatcher that he was being taken off the payroll as of that time on Poe's orders (R. 353; A. 61-62). The dispatcher then waited un-

til after 9:00 a.m. although other drivers were available (R. 363; A. 48-49) and, on Poe's instructions, assigned another union supporter, Wilson, to go to Prestressed (R. 354; A. 67-68). Wilson also refused to cross the picket line, and Poe, who had personally arrived at the Prestressed yard, informed Wilson that he had "quit" (R. 354; A. 67-68, 128). Both Mathis and Wilson had been known to Poe as union supporters (R. 342-343, 363).

Thereafter, Poe telephoned an employee named Davis, whom he knew to be a union organizer (R. 363; A. 92-94), and who had been laid off more than a month before (R. 355; A. 94). He asked Davis to report for work immediately although other drivers who had not been laid off were available (R. 363; A. 27-28, 48-49). When Davis arrived, Poe ordered him to drive his truck to Prestressed. Davis refused to cross the picket line and was treated as having declined to return to work (R. 355-356; A. 97-98).

Tampa Sand's time and delivery records demonstrated that it had a considerable number of employees available for work on May 26 and that there was a light schedule of deliveries to be made on that day (R. 359-362). Prestressed's management had barely enough work to keep the single driver who was sent over from Tampa Sand as Stringfellow's replacement occupied for the day (R. 366; A. 78-79, 81-82).

B. The Board's conclusions and order

The Board found that Tampa Sand had "constructively discharged" employees Mathis, Wilson and Davis when it placed them "in the position of either

crossing the picket line established at the premises of the other [petitioners] * * *, or being placed in a 'quit' status" (R. 453). It adopted the trial examiner's findings, including his conclusion "that Poe acted throughout with discriminatory intent to utilize the shibboleth of Prestressed's picket line, not only to expose union adherents, but to disqualify them as quits from voting in the coming election" (R. 365). Consequently, it found that the discharges violated Sections 8(a)(3) and 8(a)(1) of the Act.[3] The Board's order, in relevant part, required Tampa Sand to cease and desist from the unfair practices found, to offer the named employees reinstatement, and to make them whole for wage losses attributable to their unlawful discharges (R. 456-459).

C. The decision of the court of appeals

The court of appeals found "ample" evidentiary support in the record for the Board's findings regarding the employer's intent (Pet. 22), and it enforced the Board's order. It held "that when it appears that a discharge of an employee for refusing to cross a picket line is resorted to out of anti-union animus to get rid of a union sympathizer and not to preserve the efficient operation of an employer's business, an unfair labor practice in violation of § 8(a)(1) and (3) occurs" (Pet. 23).

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[3] The Board alternatively held that, even in the absence of any scheme to use the picket line to justify discharges, petitioners would have violated Section 8(a)(3) because the concerted refusal to cross the picket line was a protected activity under the Act (R. 453).

ARGUMENT

The decision of the court of appeals is clearly correct, and there is no conflict of decisions. No issue warranting review by this Court is presented.

1. By disregarding the Board's finding of unlawful intent, upon which the court of appeals based its enforcement of the Board's order, petitioners would make this case appear to involve an employer's legitimate business decision to discharge employees who refuse to cross a picket line located upon another employer's premises. Although the Board held alternatively that a refusal to cross a picket line is a form of concerted activity for mutual aid or protection which is encompassed by the Act (note 3, *supra*), its findings regarding the employer's motive independently sustain its conclusion that the discharges violated Sections 8(a)(3) and 8(a)(1) of the Act. The court of appeals proceeded entirely upon the latter ground of decision.

2. The Board found, on what the court of appeals held to be "ample evidence," that the employer's general manager had assigned three known union sympathizers to a job which would have required them to cross a picket line with knowledge that they would refuse to do so and with the intent of then discharging them in order to "eliminate votes for the union in the pending representation election" (Pet. 22). This finding of fact was based upon substantial evidence regarding the employer's hostility to the union (R. 312-350), upon proof that "other drivers were on duty and available who * * * would have no compunction about crossing the picket line of Florida

Prestressed" (Pet. 22-23), and on the Board's finding that "there was certainly no need for another truck" on the job (R. 364). Petitioners do not challenge the sufficiency of the evidence to sustain the Board's finding of unlawful intent. Hence the single issue presented is whether an employer may, consistently with Sections 8(a)(3) and 8(a)(1) of the Act, resort to the stratagem of assigning union members to sham jobs which require them to cross picket lines in order to rid itself of union organizers and adherents. Since such a scheme is merely a roundabout means of discharging union supporters, it is as much a violation of Section 8(a)(3) as a straightforward dischage because of union membership, *National Labor Relations Board* v. *Jones & Laughlin Steel Co.*, 301 U.S. 1, 46; *Associated Press* v. *National Labor Relations Board*, 301 U.S. 103, 132, or a refusal to hire because of union affiliation, *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177.

3. The decision of the Seventh Circuit in *National Labor Relations Board* v. *Illinois Bell Telephone Co.*, 189 F.2d 124, certiorari denied, 342 U.S. 885, is clearly distinguishable because in that case there was not "a scintilla of proof that * * * [the employer] interfered in any form or manner with the right of its employees to join a labor organization of their own choice * * *. There [was] no evidence of any hostility or favoritism on behalf of [the employer] * * * against or for any union." 189 F.2d at 129.

The finding of unlawful intent in the present case also distinguishes these facts from those in *National*

Labor Relations Board v. *Rockaway News Supply Co.*, 345 U.S. 71, upon which petitioners rely. In *Rockaway News* this Court observed that "there is no finding, evidence or even charge that the dismissal of Waugh resulted from antiunion bias, or was intended to or did discriminate against him to discourage membership in a labor organization." 345 U.S. at 75.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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October 1963.

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SUPPLEMENTAL PETITION

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Supreme Court of the United States

OCTOBER TERM, A. D., 1963.

No. 520.

**CONE BROTHERS CONTRACTING COMPANY;
TAMPA SAND & MATERIAL COMPANY;
FLORIDA PRESTRESSED CONCRETE CO., INC.,**
Petitioners,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

SUPPLEMENTAL PETITION AND BRIEF IN SUPPORT OF PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES

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Petitioners,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

SUPPLEMENTAL PETITION AND BRIEF IN SUPPORT OF PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Your Petitioner respectfully shows:

I. SUMMARY OF THE CASE.

Petitioner supplements its petition heretofore filed seeking review of the decision rendered by the United States Court of Appeals for the Fifth Circuit in the case of *NLRB v. Cone Brothers Contracting Company*, 317 F.2d 3 (5th Cir. 1963) (Pet. 13-23). The Court

ordered enforcement of the Board's decision and order which is reported at 135 NLRB 108 (Pet. 24-25).

The order of the Fifth Circuit Court of Appeals denying rehearing was entered June 29, 1963 (Pet. 28); the final decree was entered July 10, 1963, and amended on July 31, 1963 (Pet. 26-27).

II. STATUTE INVOLVED.

The relevant provisions of the Labor Management Relations Act are set forth in the petition (Pet. 2-3).

III. QUESTION PRESENTED.

The question presented is whether or not the discharge of an employee, who *individually* refuses to cross a picket line of a union (of which he is not a member), at his employer's place of business, constitutes an unfair labor practice violating Sections 8(a)(1) and (3) of the Labor Management Relations Act.

IV. STATEMENT OF THE CASE.

The pertinent facts are set forth in the petition (Pet. 3-5).

V. REASON FOR GRANTING THE WRIT.

Petitioner requests review of the decision below because it is in conflict with a decision of the Court of Appeals for the Seventh Circuit, namely, *NLRB v. Illinois Bell Telephone Co.*, 189 F. 2d 124 (7th Cir. 1951),

cert. denied 342 U.S. 885 (1951). The Respondent in its reply contests the applicability of the *Illinois Bell* case and charges that petitioner has disregarded the holding of the Board and the Court below. Petitioner files this supplemental petition in response to Respondent's brief.

In arriving at its decision in this case, the Fifth Circuit Court of Appeals stated:

> "This court in *NLRB v. Montag Bros., Inc.*, 140 F.2d 730 (C.A. 5, 1944), and it would also seem in *J. A. Bentley Lumber Co. v. NLRB*, 180 F.2d 641 (C.A. 5, 1950), held, but without analysis or discussion, that it was an unfair labor practice for an employer to discharge an employee for refusing to cross a picket line in the course of his work." (Citations omitted.)

From this erroneous premise, founded upon cases involving a clear finding of *concerted* activity, the Court of Appeals then discussed the petitioner's anti-union animus and held:

> ". . . when it appears that a discharge of an employee for refusing to cross a picket line is resorted to out of anti-union animus to get rid of a union sympathizer and not to preserve the efficient operation of an employer's business, an unfair labor practice in violation of Sections 8(a)(1) and (3) occurs."

This holding actually raises two questions; first, the question originally raised by the Petition, whether or not an employer may discipline an employee for re-

fusing to perform a task legitimately within the scope of his job. This question, Petitioner insists, must be answered before reaching the second question which involves the second conclusion of the Court of Appeals above. The second question is, assuming the employer has no right to discharge an employee who refuses to perform a task as directed, does the employer's anti-union animus establish the required unlawful intent to discriminate against the employee so disciplined?

Petitioner asserts that it has not disregarded the Board's conclusion or the holding of the Court. It challenges the correctness of the premise of law upon which the Board and the Court proceeded, namely, that it is "an unfair labor practice for an employer to discharge an employee for refusing to cross a picket line in the course of his work". The rule, as stated by the Court below, is not within the protection, granted by the Labor Management Relations Act, and the cases decided by the courts, have never extended or interpreted the Act to embrace such a sweeping principle. In fact, as pointed out in the petition, this Court declined to pass upon this question in *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71 (1953), since the issues there could be resolved under the terms of a collective bargaining contract.

Petitioner respectfully submits that the first question set out herein (and in the Petition for Certiorari) must be decided prior to the resolution of the second question. If the second question is then reached, the Court,

sh ald then decide the correctness of the pronouncement below, namely, whether or not an employer's anti-union animus is sufficient to establish an unlawful intent in the discharge of the discriminatees here in question.

More specifically, petitioner urges that the anti-union animus of an employer is not sufficient to establish that a discharge was intended to or did in fact discriminate against one as a union member or was designed to discourage membership in a labor organization. If this is the rule (or is to become the rule), then it is necessary only for General Counsel to prove a discharge of a union member and the employer's anti-union animus to establish a Section 8(a)(3) violation. That such a showing is insufficient to establish the required unlawful motive has been commented upon in *NLRB v. West Texas U. Co.*, 119 F.2d 683 (5th Cir. 1941), as follows:

> "The facts that [dischargees] were prominent members of the union and the company was antagonistic to it do not sufficiently support the Board's finding that their discharges were responsive to the union activities of the men."

In *NLRB v. McGahey*, 233 F.2d 406, 409 (5th Cir. 1956), it was stated:

> "[W]e recognize that anti-union bias, strong convictions against unions or opposition to the underlying philosophy of the Labor Management Relations Act is not itself an unfair labor practice.

> In a free democracy, it is the citizen, not the government, who fixes his own beliefs."

A more recent announcement was in *NLRB v. Hudson Pulp & Paper Corporation*, 273 F.2d 660 (5th Cir. 1960), as follows:

> "The opposition of an employer to union organization and restraint, coercion and interference are not enough, without more, to make the discharge of an employee a wrongful one."

The announcement in the instant case by the Court of Appeals above set forth fails to recognize the requirement of showing employer motive to discriminate against the individual employee because of union membership or to discourage the exercise of employee-guaranteed rights in order to establish a violation of the Act.

Petitioner contends that the principle announced in *NLRB v. Illinois Bell Telephone Co., supra*, is correct, namely, that an employer may discipline an employee who individually refuses to perform a task within the scope of his employment including refusing to cross a picket line (of a union other than his own) to report to work. This question must be resolved prior to reaching the problem of an employer's anti-union animus; further, anti-union animus is insufficient of itself to make the discharge of an employee an unlawful one.

CONCLUSION

Petitioner respectfully requests, for the reasons set forth above, that its petition for writ of certiorari be granted and that the judgment of the United States Court of Appeals for the Fifth Circuit be reversed.

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CERTIFICATE OF SERVICE.

Copies hereof, have this date been served, according to the rules of this Court, by depositing same in the United States Mail, first class postage prepaid, upon the following:

Archibald Cox, Esquire,
Solicitor General,
Department of Justice,
Washington 25, D. C.,

Stuart Rothman, Esquire,
General Counsel,
National Labor Relations Board.
Washington 25, D. C.;

Dominick L. Manoli, Esquire,
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Marcel Mallet-Prevost, Esquire,
Assistant General Counsel,
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Washington 25, D. C.,

This ..... day of November, 1963.

JOHN BACHELLER, JR.,
I. WALTER FISHER.